

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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|----------------------------------|---|---------------------------|
| JILL ELAINE VAN SKIKE, |) | |
| |) | CASE NO. C12-1701-MJP-MAT |
| Plaintiff, |) | |
| |) | |
| v. |) | REPORT AND RECOMMENDATION |
| |) | RE: SOCIAL SECURITY |
| CAROLYN W. COLVIN, Acting |) | DISABILITY APPEAL |
| Commissioner of Social Security, |) | |
| |) | |
| Defendant. |) | |
| _____ |) | |

Plaintiff Jill Van Skike proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be reversed and remanded for further proceedings.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1985.¹ She has a high school diploma, and has previously worked as a dishwasher and fast-food worker. (AR 178-181, 188, 192.)

On June 2, 2009, Plaintiff filed applications for SSI and DIB. (AR 125-29.) Those applications were denied initially and on reconsideration, and Plaintiff timely requested a hearing. (AR 60-63, 67-73.)

On January 25, 2011, ALJ Marguerite Schellentrager held a hearing, taking testimony from Plaintiff and a vocational expert. (AR 26-55.) On March 18, 2011, the ALJ issued a decision finding Plaintiff not disabled. (AR 9-20.) Plaintiff timely appealed. The Appeals Council denied Plaintiff's request for review on August 6, 2012 (AR 1-3), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found Plaintiff not

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 engaged in substantial gainful activity since October 28, 2008, the alleged onset date. (AR
02 11.) At step two, it must be determined whether a claimant suffers from a severe impairment.
03 The ALJ found that Plaintiff's status post left shoulder fracture and surgery, obesity, and
04 borderline intellectual functioning were severe impairments. (AR 11-12.) Step three asks
05 whether a claimant's impairments meet or equal a listed impairment. The ALJ found that
06 Plaintiff's impairments did not meet or equal the criteria of a listed impairment. (AR 12-13.)

07 If a claimant's impairments do not meet or equal a listing, the Commissioner must
08 assess residual functional capacity (RFC) and determine at step four whether the claimant has
09 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of
10 performing light work, but she is limited to lifting 5-10 pounds (no overhead) with her left
11 arm. The ALJ placed no restrictions on Plaintiff's use of her right arm. As to mental
12 limitations, the ALJ found that Plaintiff is capable of performing unskilled manual labor, and
13 is limited to simple, repetitive tasks. The ALJ found that Plaintiff can accept instructions
14 from her supervisors and can interact with co-workers and the public. With that assessment,
15 the ALJ found Plaintiff capable of performing her past work as a kitchen helper and fast-food
16 worker. (AR 18-20.) The ALJ also entered alternative findings at step five, finding that
17 Plaintiff can perform the requirements of other representative occupations such as maid and
18 small parts assembler. (AR 19.)

19 This Court's review of the ALJ's decision is limited to whether the decision is in
20 accordance with the law and the findings supported by substantial evidence in the record as a
21 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
22 more than a scintilla, but less than a preponderance; it means such relevant evidence as a

01 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
02 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
03 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
04 F.3d 947, 954 (9th Cir. 2002).

05 Plaintiff argues the ALJ erred in (1) discounting Plaintiff's credibility; (2) failing to
06 discuss Plaintiff's dependent personality disorder diagnosis at step two; (3) finding that
07 Plaintiff's impairments did not meet a listing at step three; (4) rejecting the opinions of
08 Rodger Mainz, Ph.D., and Ellen Kim, M.D., and failing to account for the limitations they
09 identified; (5) finding that Plaintiff's fast-food job constituted substantial gainful activity; and
10 (6) rejecting lay statements provided by Plaintiff's mother and family friend. The
11 Commissioner argues that the ALJ's decision is supported by substantial evidence and free
12 from harmful error.

13 Credibility

14 An ALJ can discount a claimant's credibility only with clear and convincing reasons
15 to do so, absent affirmative evidence of the claimant's malingering. *Lingenfelter v. Astrue*,
16 504 F.3d 1028, 1036 (9th Cir. 2007). There is no evidence of malingering in this case, and
17 the ALJ provided a number of reasons to discount Plaintiff's credibility. (AR 14-16.) The
18 parties agree that some of the ALJ's reasons were based on inaccurate factual representations
19 regarding Plaintiff's daily activities and work history; according to Plaintiff, these reasons
20 suggest that the credibility determination as a whole is flawed, but the Commissioner
21 characterizes the inaccuracies as "minor" and asserts that the ALJ's ultimate credibility
22 finding is still supported by substantial evidence. Dkt. 12 at 4-6; Dkt. 13 at 6-10.

01 In addition to the credibility rationale predicated on factual inaccuracies, the ALJ first
02 pointed to evidence showing that Plaintiff's shoulder surgery and subsequent physical therapy
03 nearly entirely reduced her shoulder pain, with a mild flare-up occurring after swimming.
04 (AR 15.) The ALJ found that Plaintiff's discontinuing physical therapy after October 2009
05 suggests that her shoulder pain had improved. Though the ALJ acknowledged that Plaintiff
06 presented to a treating physician in November 2009 with shoulder pain after lifting heavy
07 objects, the ALJ interpreted the fact that Plaintiff failed to follow-up with her physician after
08 receiving a short course of medication to mean that her pain was acute (caused by the heavy
09 lifting) and resolved thereafter. (AR 15-16.)

10 Plaintiff does not dispute that the ALJ's inferences drawn from this evidence are
11 reasonable, and does not claim that this is an invalid reason to discount credibility. *See* Dkt.
12 14 at 6. She instead attempts to refocus the Court's attention on the ALJ's credibility findings
13 as to mental (rather than physical) symptoms, but such an approach is inconsistent with
14 credibility findings generally: an ALJ may find a claimant not credible *in general* due to
15 reasons based on her physical allegations, mental allegations, or both. *See Turner v. Comm'r*
16 *of Social Sec. Admin.*, 613 F.3d 1217, 1224-25 (9th Cir. 2010) (finding that discrepancies in a
17 claimant's testimony regarding physical impairments provide a valid basis to discount the
18 claimant's credibility regarding "any allegation of total disability," including mental
19 impairments).

20 The Court therefore rejects Plaintiff's suggestion that the ALJ's findings as to the
21 credibility of her physical allegations are "inapplicable" to analyzing Plaintiff's credibility as
22 to mental allegations. *See* Dkt. 14 at 6:3-5. That the ALJ may have relied on inaccurate

01 factual understandings of Plaintiff's ability to muck out stables, the frequency with which she
 02 rode horses, or her work history² in order to discount the credibility of other allegations does
 03 not render the overall credibility determination invalid, given that the remaining reasoning
 04 regarding Plaintiff's shoulder impairment is undisputedly accurate and valid. *See Carmickle*
 05 *v. Comm'r of Social Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008) (holding that
 06 including invalid reasons to discount credibility is harmless error, if "the remaining reasoning
 07 and ultimate credibility determination were adequately supported by substantial evidence in
 08 the record") (citing *Batson v. Comm'r of Social Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir.
 09 2004) (emphasis in original)).

10 Dependent Personality Disorder and Dr. Mainz's Opinion

11 Consultative examiner Rodger Mainz, Ph.D., diagnosed Plaintiff with, *inter alia*,
 12 dependent personality disorder. (AR 260, 266-67.) The ALJ did not discuss this diagnosis at
 13 step two, but mentioned it in her discussion of Dr. Mainz's opinion. (AR 16.) She further
 14 explained why she rejected Dr. Mainz's "speculative theory of passive dependence":

15 On the whole the evidence shows an active, engaged young woman who
 16 remains capable of performing a multitude of tasks independently,
 17 collaboratively, and otherwise despite her mild mental retardation. That the
 18 claimant returned to work so shortly after her surgery and remains there, as
 19 well as performing her litany of daily tasks, belies [Dr. Mainz's] speculative
 20 theory of passive dependence and the claimant as an "untenable prospect for
 21 employment."

19 . . .

20 [Dr. Mainz] opined that the claimant's perceived passivity, apparent slow
 21 processing speed, and reading and arithmetic levels reduce her to an

22 ² The ALJ's inaccurate understanding of the facts of this case will be discussed in other sections of this Report and Recommendation.

01 “untenable prospect” in the “competitive marketplace,” ([AR 266-67]). [Dr.
 02 Mainz] apparently believes the world of fast food and unskilled manual labor
 03 to be ruthlessly competitive in nature, with hordes of candidates fighting each
 04 other for these highly coveted positions. Dr. Mainz’s opinion is not at all
 05 consistent with the majority of evidence presented in the file, most of all the
 06 fact that the claimant has worked consistently at almost full time levels at KFC
 07 since April 2009, feeds and waters nine horses and other animals on the farm,
 08 and independently assists her elderly grandmother on a daily basis. Dr.
 09 Mainz’s rather damning assessment of the claimant affords her no credit for
 10 her rather busy schedule and his presuppositions about the claimant’s passivity
 11 and inability to compete are not otherwise corroborated. [Dr. Mainz’s] opinion
 12 is granted little weight.

08 (AR 17.) According to Plaintiff, the ALJ should have included dependent personality
 09 disorder as a severe impairment at step two, and failed to provide specific and legitimate
 10 reasons to discount Dr. Mainz’s opinion.³ See *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir.
 11 1995) (requiring specific and legitimate reasons to discount a contradicted treating or
 12 examining physician’s opinion).

13 As both parties agree to at least some degree, the ALJ relied on inaccurate facts when
 14 assessing Dr. Mainz’s opinion. Specifically, the ALJ believed that Plaintiff returned to work
 15 at KFC after her shoulder injury in October 2008 and continued to work at the time of Dr.
 16 Mainz’s evaluation, even though the record contains no such evidence. The wording of Dr.
 17 Mainz’s opinion suggests that Plaintiff’s KFC job was in the past and was not ongoing (AR
 18 263-64), and other evidence in the record unequivocally indicates that her KFC job did not
 19 continue beyond 2008. See AR 38 (Plaintiff’s testimony that she stopped working at KFC
 20 because she broke her shoulder), 131-33 (earnings report (dated October 13, 2010) showing

21 _____
 22 ³ Though Plaintiff addressed these issues as separate assignments of error, the Court combines them
 because they are interrelated: if Dr. Mainz’s opinion was properly rejected, then that rejection could justify
 omitting Dr. Mainz’s dependent personality disorder diagnosis at step two.

01 Plaintiff's most recent earnings in 2008), 178 (Plaintiff reporting in May 2009 that her KFC
02 job ended in October 2008), 187 (Plaintiff reporting in June 2009 that she last worked in
03 October 2008).⁴ Thus, the ALJ's interpretation of the evidence of Plaintiff's work history is
04 not reasonable, and Plaintiff's "return to work" is not a legitimate basis to discount Dr.
05 Mainz's opinions regarding the severity of her symptoms because there is no evidence that
06 Plaintiff actually did return to work.

07 The ALJ also relied on an inaccurate understanding of Plaintiff's daily activities to
08 find Dr. Mainz's opinion inconsistent. Specifically, the ALJ stated that Plaintiff rode horses
09 two or three times a week, when she in fact testified that she rode them three or four times a
10 month. (*Compare* AR 16 with AR 32.) The ALJ also claimed that Plaintiff mucked out the
11 horse stables, but she testified that she did not muck out the stables but only added shavings.
12 (*Compare* AR 16 with AR 34.)

13 The ALJ arguably also overstated the extent to which Plaintiff assisted her
14 grandmother, whom she lived with: the ALJ described Plaintiff as "independently assist[ing]
15 her elderly grandmother on a daily basis" (AR 17) but the record indicates that Plaintiff made
16 her breakfast, turned on her television, and made her bed, but if her grandmother needed other
17 assistance Plaintiff simply informed her mother. (AR 37, 155.) Plaintiff also informs her
18 mother when her grandmother awakens, so that her mother can move her; Plaintiff stated that
19 her shoulder injury prevents her from helping move her grandmother. (AR 205.) Thus,
20 Plaintiff's assistance to her grandmother is not entirely as "independent" as the ALJ

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22 ⁴ See also AR 11 (the ALJ's finding that Plaintiff had not engaged in substantial gainful activity since October 28, 2008).

01 characterized it to be.

02 The ALJ also apparently misconstrued Dr. Mainz's opinion regarding the effect of
03 Plaintiff's passivity; the ALJ sarcastically suggested that Dr. Mainz's characterization of the
04 competitive nature of fast-food employment was inaccurate (AR 17), but missed Dr. Mainz's
05 point that Plaintiff's passivity left her open to exploitation *on the job*. Dr. Mainz did not
06 suggest that Plaintiff would be unable to navigate a "ruthlessly competitive" application
07 process in order to obtain a "highly coveted position[]," but instead indicated that Plaintiff
08 "lacks the assertive skills to fend for herself" in a work setting, and "would need to work in
09 either a sheltered workshop or in an indigenously supported work setting, where others knew
10 to look out for her and had agreed to do so." (AR 267.) The ALJ dismissed Dr. Mainz's
11 concerns about Plaintiff's ability to maintain competitive employment "most of all" because
12 she had continued to work consistently at KFC since April 2009, but again, the ALJ was not
13 operating with an accurate timeline of Plaintiff's work history.

14 For these reasons, none of the ALJ's reasons for rejecting Dr. Mainz's opinion are
15 legitimate because they all depend to at least some degree on an inaccurate understanding of
16 the facts. The ALJ found that the opinion of Suzanne Canning, M.D., more reasonably
17 matched Plaintiff's demonstrated capabilities rather than did Dr. Mainz's opinion, but it is not
18 clear that the ALJ would have so concluded if she had properly apprehended the facts.
19 Accordingly, on remand the ALJ shall reconsider Dr. Mainz's opinion and diagnoses
20 contained therein, and consider whether any adjustment to the RFC assessment is thereby
21 warranted.

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01 Step Three

02 Plaintiff argues that the ALJ erred in finding that she did not meet the requirements of
03 Listing 12.05C, on the grounds that the combination of her dependent personality disorder
04 with her borderline intellectual function results imposes an additional and significant work-
05 related limitation of function. Dkt. 12 at 8-9. The ALJ did not account for Plaintiff's
06 dependent personality disorder diagnosis in the original decision, because she rejected Dr.
07 Meinz's opinion and diagnosis. But because the Court should direct the ALJ to reconsider Dr.
08 Meinz's opinion (which contains the dependent personality disorder diagnosis) on remand,
09 the Court should also instruct the ALJ to reconsider, if necessary, whether Plaintiff meets the
10 requirements of Listing 12.05C in light of her reconsideration of Dr. Meinz's opinion.

11 Dr. Kim's Opinion

12 Plaintiff argues that the ALJ failed to provide specific and legitimate reasons to reject
13 the opinions of treating physician Ellen Kim, M.D. In February 2010, Dr. Kim opined that
14 Plaintiff's "bird fancier's lung" condition and pneumonia rendered her "severely limited" for
15 approximately 50-60 days. (AR 420-23.) Dr. Kim also completed a "physical residual
16 functional capacity questionnaire" in November 2010, wherein she opined regarding a
17 number of physical functional capacity categories, including reaching, handling, and
18 fingering: she indicated that Plaintiff was limited to handling 60% of a workday, fingering
19 60% of a workday, and reaching 20% of a workday. (AR 427.) Dr. Kim also completed a
20 mental evaluation in November 2010, where she addressed a number of categories of mental
21 function. (AR 462-466.)

22 The ALJ assigned "little to no weight" to Dr. Kim's November 2010 physical residual

functional capacity questionnaire. (AR 17-18.) According to the ALJ, Dr. Kim's opinions are "not supported by any interpretation of the objective or subjective evidence in the file, including Dr. Kim's own treatment records."⁵ (AR 18.) This reason is specific and legitimate, because Dr. Kim's treatment notes do not support her opinions regarding Plaintiff's limitations: the treatment notes refer only to November 2009 pain after heavy lifting, followed by Dr. Kim's recommendation to try medication and physical therapy, and if those did not improve her symptoms, she was directed to return to Dr. Kim. (AR 431.) There is no evidence that Plaintiff ever followed up with Dr. Kim, or informed her that her pain persisted. Thus, Dr. Kim's opinions regarding significant physical limitations are not supported by the treatment record and the ALJ did not err in discounting the opinions on that basis.

Past Relevant Work

The ALJ characterized Plaintiff's job at KFC as "past relevant work" and "substantial gainful activity," and concluded that Plaintiff was capable of performing that job. (AR 18.) Plaintiff contends that her work at KFC does not actually indicate an ability to do "substantial gainful activity" because it was performed under special conditions, namely extra training and attention from her supervisor, who was a family friend. *See* 20 C.F.R. § 404.1573 (explaining how special conditions in a past job may not indicate that a claimant can do substantial gainful activity).

The Court rejects Plaintiff's attempt to characterize the extra training that Plaintiff

⁵ The ALJ incorrectly cites AR 462-66 as Dr. Kim's treatment notes; the notes are actually found at AR 429-461.

01 received from her KFC supervisor as a “special condition” as defined by 20 C.F.R. §
02 404.1573. Even assuming that Plaintiff’s supervisor’s statement is credited as true, his
03 statement establishes that Plaintiff required some additional training when learning a new
04 task, but once she learned the task (within 1-2 weeks), she was “very good” at performing
05 each task. (AR 235.) Plaintiff also testified that aspects of her KFC job were hard at first, but
06 became easier with more experience. (AR 42-43.) There is no evidence of record showing
07 that Plaintiff required assistance in performing the work duties of her KFC job, but only that
08 she received additional training, and thus the ALJ did not err in characterizing Plaintiff’s KFC
09 job as substantial gainful activity. *See* 20 C.F.R. § 404.1573(c)(1) (indicating that “special
10 assistance from other employees *in performing your work*” may constitute a “special
11 condition”) (emphasis added).

12 Lay Statements

13 The record contains two lay statements, one from Plaintiff’s mother and another from
14 Plaintiff’s KFC supervisor and family friend Grant Smith. (AR 233-36.) The ALJ gave “little
15 consideration” to Mr. Smith’s statement because his description of Plaintiff’s work abilities
16 was “at odds with [Plaintiff’s] own explanation of her multiple job duties,” and her ability to
17 return to work so shortly after her shoulder injury “is a testimony to her worth as an
18 employee.” (AR 18.) The ALJ also noted that Mr. Smith described Plaintiff as able to learn a
19 new job task within a week as consistent with her finding that she could perform an SVP-2
20 job. (*Id.*)

21 The ALJ also gave “limited consideration” to Plaintiff’s mother’s statement,
22 describing the diminishment of Plaintiff’s ability to care for horses and drive since her

01 shoulder injury. (AR 18 (citing AR 233-34).) The ALJ contended that Plaintiff's mother's
02 statement was contradicted by Plaintiff's self-reported "high level of daily involvement and
03 labor at the farm, as well as her extensive outside activities." (AR 18.) The ALJ also posited
04 that Plaintiff's mother had a motive of secondary gain in Plaintiff obtaining disability benefits
05 because Plaintiff lived with her mother. (*Id.*)

06 According to Plaintiff, the ALJ's reasons for discounting the lay evidence were not
07 germane. *See Smolen v. Chater*, 80 F.3d 1273, 1288-89 (9th Cir. 1996). The Commissioner
08 contends that the ALJ did provide germane reasons, and that any error was harmless because
09 the ALJ's RFC assessment accounts for all limitations identified in the lay statements.

10 The Court agrees with both Plaintiff and the Commissioner: the ALJ's reasons for
11 discounting the lay statements were at least in part improper, but any error was harmless. As
12 to Mr. Smith's statement, the ALJ again reiterated her mistaken impression that Plaintiff
13 returned to work after her shoulder injury, thereby indicating her worth as an employee in
14 contradiction to Mr. Smith's description of her struggle, and this reasoning is therefore not
15 germane to Mr. Smith's statement.

16 And as to Plaintiff's mother's statement, the ALJ relied upon an overstated version of
17 the extent of Plaintiff's ability to perform farm labor and engage in "extensive outside
18 activities." Moreover, the ALJ did not specifically assess Plaintiff's mother's motivation for
19 secondary gain: the ALJ did not explain why *Plaintiff's mother in particular* would be
20 motivated to exaggerate Plaintiff's symptoms. The general desire that a family member may
21 feel to help a member of one's household to obtain benefits is not a germane reason to
22 discount Plaintiff's mother's statement. *See Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir.

2009) (holding that “friends and family members in a position to observe a claimant’s symptoms and daily activities are competent to testify as to her condition” (quoting *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993))). Without evidence that Plaintiff’s mother had exaggerated, the ALJ’s reasoning was not sufficiently germane.

But, as noted by the Commissioner, neither Mr. Smith nor Plaintiff’s mother suggested that Plaintiff was more limited than as found by the ALJ in the RFC assessment: their observations are consistent with an ability to perform simple and repetitive unskilled work, and to accept instructions from supervisors and interact with co-workers and the general public. Compare AR 14-18 (the ALJ’s RFC assessment) with AR 233-36 (the lay statements). Accordingly, the ALJ’s error in assessing the lay statements was harmless because even if the statements were credited, they would not alter the outcome of the case. See *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012).

CONCLUSION

For the reasons set forth above, this matter should be REVERSED and REMANDED for further administrative proceedings. On remand, the ALJ shall reconsider Dr. Mainz’s opinion and dependent personality disorder diagnosis, and then, if necessary, reconsider whether Plaintiff meets the requirements of Listing 12.05C and whether any adjustments should be made to Plaintiff’s RFC assessment.

DATED this 9th day of April, 2013.



Mary Alice Theiler
United States Magistrate Judge